Supreme Court, U.S.
FILED

No. (1)

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In The Supreme Court of the United States

KIMBERLY DOANE,
a/k/a KIMBERLY HARIG,

Petitioner,

v.

EDUCATIONAL CREDIT MANAGEMENT CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WAS THE CHAPTER 13 BANKRUPTCY DISCHARGE ORDER WHICH DISCHARGED MS. DOANE'S STUDENT LOAN ENTITLED TO PRECLUSIVE EFFECT, OR ARE SUCH ORDERS VOID, WHEN THE DEBTOR DOES NOT FIRST INITIATE AN ADVERSARY PROCEEDING TO DETERMINE THE DISCHARGEABILITY OF THE STUDENT LOANS?

II. WAS THE ERRONEOUS FORM DISCHARGE ORDER ISSUED TO MS. DOANE, WHICH WAS BASED ON THE ADMINISTRATIVE OFFICE OF U.S. COURTS' FORM DISCHARGE ORDER, ENTITLED TO PRECLUSIVE EFFECT OR IS IT VOID?

PARTIES TO THIS PROCEEDING

The petitioner is Kimberly Doane (formerly known as Kimberly Harig), a citizen of Roanoke, Virginia.

The respondent is Educational Credit Management Corporation (ECMC) is a student loan guaranty agency which services federally-guaranteed student loans. ECMC is headquartered in Illinois.

CORPORATE DISCLOSURE STATEMENT

Ms. Doane is not a corporation. Ms. Doane has no parent corporation, nor does any publicly owned company own 10 percent or more of relevant stock.

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Petitioner Kimberly Doane prays that this Court will grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered on June 28, 2004 and the order denying the petitions for rehearing entered on August 27, 2004.

OPINIONS BELOW

The June 28, 2004 opinion of the Court of Appeals, reported as *ECMC v. Doane*, 102 Fed.Appx. 312 (4th Cir. 2004), is set out at pages A-3 through A-7 of the Appendix. The August 27, 2004 order denying the petition for rehearing is at A-1 through A-2 of the Appendix. The decision of the district court is reported as *ECMC v. Harig*, 302 B.R. 177 (W.D.Va.2003) and is in the Appendix at A-8 through A-20.

JURISDICTIONAL STATEMENT

The United States Court of Appeals entered its decision on June 28, 2004 (App. A-3). The petitioner Ms. Doane sought rehearing of the panel decision, and the Court of Appeals denied the motions for rehearing on August 27, 2004 (App. A-1). This Court has jurisdiction pursuant to 28 U.S.C.§ 1254(1).

STATUTES AT ISSUE

This case requires this Court to determine whether the respondent student loan creditor ECMC is entitled to relief, pursuant to Bankruptcy Rule 9024 (which adopts Federal Rule of Civil Procedure 60), from the bankruptcy court's order which discharged the debtor's student loan debt.

Federal Rule of Civil Procedure 60(b) states, in relevant part:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void . . . .

STATEMENT OF THE CASE

On June 14, 1996, Kimberly Doane (her name then was Kimberly Harig), an elementary school teacher and a single mother, filed a voluntary Chapter 13 case in the United States Bankruptcy Court for the Western District of Virginia.

Chapter 13 bankruptcy allows wage earners to repay their debts over a period of three to five years by proposing a plan, which must be confirmed by order of the bankruptcy court. 11 U.S.C. § 1322. Pursuant to the plan, the debtor is required to make periodic payments to a trustee, who then distributes payments to creditors. 11 U.S.C. § 1325. Once the payments under the plan are completed, the bankruptcy court issues a discharge order, releasing the debtor of her legal liability to the creditors. 11 U.S.C. § 1328. Notice of the plan, the confirmation hearing, the confirmation order, and the discharge are provided to creditors by mail. Fed. R. Bankr. Pro. 2002.

Mrs. Doane listed her student loan debt to Educational Credit Management Corporation ("ECMC") on her bankruptcy schedules. She did not provide for payment of the student loan debt as a priority debt in her plan. Her plan merely provided for payment of her

unsecured debts. The plan was confirmed, Mrs. Doane completed payments, and the bankruptcy court issued Mrs. Doane a form discharge order which stated that the student loan debt was discharged, even though it was not provided for in the plan.

The bankruptcy court issued the form discharge order which was drafted by the Bankruptcy Judge's Division of the Administrative Office of the United States Courts and distributed to bankruptcy court clerk's offices throughout the country for use, even though the discharge order erroneously contained language discharging debtors' student loans.

In 2001, Mrs. Doane reopened her bankruptcy case and filed an adversary proceeding to enjoin ECMC from collecting the discharged student loan. In response to the adversary proceeding, ECMC filed a motion for relief from the discharge order pursuant to Federal Rule of Civil Procedure 60(b)(4). The bankruptcy court denied the motion on May 23, 2002. ECMC appealed. The district court denied leave to appeal as interlocutory. ECMC then filed another motion for relief from the discharge order, in the bankruptcy case, which the bankruptcy court denied on December 20, 2002. ECMC appealed that decision. The district court reversed the bankruptcy court and "decline[d] to award the bankruptcy court's May 23, 2002 order and December 20, 2002 order preclusive effect." Mrs. Doane timely appealed the decision of the district court.

The Fourth Circuit affirmed per curiam, relying upon its earlier decision in *Banks v. Sallie Mae Servicing*

Corp., 299 F.3d 96 (4th Cir. 2002).[1] In *Banks*, the Fourth Circuit acknowledged that it was creating a split among the Circuits and held that an order of a bankruptcy court discharging a student loan debt was void unless the debtor first filed an adversary proceeding and served a summons and complaint against the student loan creditor pursuant to Federal Rule of Bankruptcy Procedure 7004. 299 F.3d at 302-303.[2] The Fourth Circuit affirmed the district court decision in Ms. Doane's case because Ms. Doane merely relied on the form discharge order and did not file an adversary proceeding to seek a discharge of the student loan. The court held that Ms. Doane's failure to file an adversary proceeding placed her case within the controlling precedent of *Banks*. (App. A-6).

Ms. Doane timely filed a petition for rehearing, but the Fourth Circuit denied the petition for rehearing on August 27, 2004. (App. A-1).

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[1] The Fourth Circuit had jurisdiction over the final decision of the district court pursuant to 28 U.S.C. § 1291.

[2] *Banks*, like most of the Chapter 13 student loan cases arising around the country since 1995, also involved the Administrative Office of the United States Courts' erroneous form discharge order, but the issue of whether the erroneous form discharge order was void for reasons separate from the failure of the debtor to serve a summons and complaint, was not addressed in *Banks*.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE FOURTH CIRCUIT'S *BANKS* DECISION, APPLIED HERE, CONTINUES A SPLIT BETWEEN THE CIRCUITS.

The Fourth Circuit's *Banks* decision, which is the basis for the Fourth Circuit's decision in Ms. Doane's case, is in direct conflict with the decision of the Tenth Circuit in *Anderson v. UNIPAC NEBHELP (In re Anderson)*, 179 F.3d 1253 (10th Cir. 1999) and the Ninth Circuit in *Great Lakes Higher Educ. Corp. v. Pardee (In re Pardee)*, 218 B.R. 916 (Bankr. 9th Cir. 1998), *aff'd*, 193 F.3d 1083 (9th Cir. 1999).

These Chapter 13 student loan cases represent a controversy over "discharge by declaration" of student loans in Chapter 13.[3] Prior to 1998, student loans could be discharged in bankruptcy after a waiting period, and the debtor was not required to file an adversary proceeding, or a separate suit in bankruptcy, to determine the dischargeability of the student loan. In 1998, the Bankruptcy Code was amended to eliminate the waiting period and to require the debtor to file an adversary proceeding to determine whether his student loans are dischargeable on the basis of hardship. 11 U.S.C. § 523(a)(8). Since 1998, debtors have included language in their Chapter 13 plan which provides for discharge of their student loan debt without first filing an adversary

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[3] A discussion of this controversy is in Driscoll, *Eradicating the "Discharge by Declaration" for Student Loan Debt in Chapter 13*, 2000 U. Ill. L. Rev. 1311 (2000).

proceeding. This has been called "discharge by declaration" and there is a split of authority as to the validity of discharge by declaration.[4]

In *Banks*, the debtor filed a plan which stated that no interest would accrue on his student loan debt while he was in Chapter 13. Banks' plan provided for payment of the principal amount of the student loan. The plan was confirmed and Banks received his discharge. After Banks received his discharge, ECMC attempted to collect the debt. Banks reopened his bankruptcy and filed an adversary proceeding against ECMC to enjoin the collection of the debt. 299 F.3d at 299. The bankruptcy court entered summary judgment for Banks because the issue of whether interest on the student loan was discharged was rendered res judicata by the confirmation of the plan. *Id.* On appeal, the district court ruled that a determination of the dischargeability of the student loan must be by an adversary proceeding and confirmation does not have a preclusive effect over those issues which must be resolved in adversary proceedings, which require service of process under Fed. R. Civ. Pro. 4. *Id.*

The Fourth Circuit affirmed the district court decision, holding that the bankruptcy court erred by holding that the confirmation order made any later

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[4] Ms. Doane's case is unique because she did not seek a discharge by declaration, but received a discharge only because the court used the erroneous form discharge order. In most of the discharge by declaration cases, the debtors sought discharge by declaration, which smacks of gamesmanship, and also received the erroneous form discharge order.

collateral attack on the discharge res judicata, precluding any collateral attack on the confirmation order. The Fourth Circuit held that a debtor cannot obtain a discharge of a student loan through a confirmation order, and the debtor should have filed an adversary proceeding to determine if the interest on the student loan would be discharged, rather than relying only on the treatment of the student loan debt in the Chapter 13 plan. 299 F.3d at 303.

The Fourth Circuit acknowledged that its decision conflicted with the decision of the Tenth Circuit in *Anderson v. UNIPAC NEBHELP (In re Anderson)*, 179 F.3d 1253 (10th Cir. 1999) and the Ninth Circuit in *Great Lakes Higher Educ. Corp. v. Pardee (In re Pardee)*, 218 B.R. 916 (Bankr. 9th Cir. 1998), *aff'd*, 193 F.3d 1083 (9th Cir. 1999), but held that the confirmation order was void and not entitled to "preclusive effect" because "due process entitled the creditor" to be joined in an adversary proceeding to determine the dischargeability of the student loan debt. 299 F.3d at 302.[5]

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[5] The premise of the Fourth Circuit's *Banks* rule is that due process requires that a student loan creditor be joined in an adversary proceeding, and be served a summons, before a student loan may be discharged under 11 U.S.C. § 523(a)(8). This Court stated, last term, in *Tennessee Student Assistance Corp. v. Hood*, ___ U.S. ____, 124 S.Ct. 1905, 158 L.Ed.2d 764 (2004), in another case involving the dischargeability of student loans in bankruptcy, that:

> The text of § 523(a)(8) does not require a summons, and absent Rule 7001(6) a debtor could proceed by motion . . . which would

In *Anderson*, the debtor presented a plan that provided for a partial payout on her student loans, with the remaining ninety percent to be discharged. The debtor did not file an adversary proceeding to determine the dischargeability of the debt. The creditor failed to object to the plan, the bankruptcy court issued a confirmation order, and then a discharge order. 179 F.3d at 1254.

After confirmation and discharge, the student loan creditor continued to attempt to collect the debt. The debtor reopened the bankruptcy case and filed an adversary proceeding to determine the dischargeability of the debt. The bankruptcy court ruled that due process required that the student loan creditor be joined in an adversary proceeding to determine whether the debtor was discharged prior to confirmation. *Anderson v. Higher Educ. Assistance Found. (In re Anderson)*, 215 B.R. 792, 794 (Bankr. 10th Cir. 1998).

On appeal, the Tenth Circuit held that due process was satisfied because the creditor received notice of the plan and the discharge by mail, as required by the Bankruptcy Rules, and had the opportunity to object to the confirmation and to the discharge. 179 F.3d at 1256. The court wrote that "a creditor cannot simply sit on its rights" and expect that its interests will be protected. *Id.* at 1257.

> raise no constitutional concern. . . . We see no reason why the service of a summons, which in this case is indistinguishable in practical effect from a motion, should be of dispositive weight.

___ U.S. ___, 124 S.Ct. at 1914, 158 L.Ed.2d at 779.

The creditor claimed that the "Bankruptcy Court exceeded its authority in confirming a plan that contained provisions contrary to the Code," *id.*, but the court stated that "a confirmed plan . . . is not rendered void merely because a certain provision of the plan may be inconsistent with, or even contrary to, the Code" because of the doctrine of res judicata. *Id.* at 1247 n.8. The court wrote that '[a]lthough the provision at issue did not comply with the Code, it is now too late for [the creditor] to make the argument" that the plan should not have been confirmed because the importance of finality outweighs the adverse effects of confirming a plan with provisions offensive to the Code. *Id.* at 1259.

The Ninth Circuit followed the Tenth Circuit's *Anderson* decision in *Great Lakes Higher Educ. Corp. v. Pardee (In re Pardee)*, 218 B.R. 916 (Bankr. 9th Cir. 1998), *aff'd*, 193 F.3d 1083 (9th Cir. 1999). In *Pardee*, the debtors proposed a plan which discharged post-petition interest on their student loan, the plan was confirmed, and the bankruptcy court issued a discharge order. 218 B.R. at 919. The student loan creditor ignored the confirmation order and discharge order, and attempted to collect the debt. The debtors reopened the bankruptcy case and filed an adversary proceeding to enforce the discharge order. *Id.* The bankruptcy court enforced the discharge order. *Id.*

On appeal, the Ninth Circuit Bankruptcy Appellate Panel wrote that "[t]he concept of the preclusive effect of final orders is a basic principle of American jurisprudence," *id.* at 923, and relied on this Court's decision in *Celotex Corp. v. Edwards*, 514 U.S. 300 (1995), which restated, in the bankruptcy context, the principle enunciated in *Stoll v. Gottlieb*, 305 U.S. 165 (1938) that a party that does not appeal a final order is precluded from collaterally attacking

that order. *Id.* The court wrote that "[w]hile the plan should not have been confirmed with the discharge provision, the plan is res judicata as to all issues that could have or should have been litigated at the confirmation hearing," *id.* at 925, even the issue of whether the discharge order was void because the student loan was nondischargeable under the Bankruptcy Code since the debtor did not file an adversary proceeding. *Id.*

The court noted that it was "mindful that the Seventh Circuit has taken a contrary position with which we . . . disagree" in *In re Escobedo*, 28 F.3d 34 (7th Cir. 1994). In *Escobedo*, which was not a student loan case, the debtor's Chapter 13 plan did not provide for payment of taxes as required by the Bankruptcy Code. After the plan was confirmed, the debtor completed payments under the plan, and a discharge was issued. The Seventh Circuit nevertheless held that it was proper to dismiss the entire plan as void because it did not comply with the Bankruptcy Code. As a result, the plan was not res judicata as to the tax claims. *Id.* at 926.

The Ninth Circuit B.A.P. wrote that since the student loan creditor received notice of the plan and the discharge order by mail, but failed to object to the plan, seek reconsideration of the confirmation order or discharge order, and failed to appeal the orders, it implicitly accepted the confirmation and discharge and was bound by the terms of the plan. The court held that the debtor was not required to first file an adversary proceeding. *Id.* The B.A.P. decision was affirmed by the Ninth Circuit. 193 F.3d at 1083.

Thus, there is a split among the circuits: the Ninth and Tenth Circuits have held that the principle of finality

requires that discharge orders be given preclusive effect, even when the debtor does not file an adversary proceeding to determine the dischargeability of a student loan debt, while the Fourth Circuit has held that due process requires that an adversary proceeding be filed before a discharge order will be given preclusive effect.

Here, Ms. Doane did not seek a discharge by declaration, but the court issued a discharge order which granted a discharge of her student loan debt. When ECMC attempted to collect the debt, Ms. Doane reopened her case and filed an adversary proceeding to determine the dischargeability of the debt. ECMC filed a motion, under Fed. R. Civ. Pro. 60(b)(4), seeking to set aside the discharge order as void because Ms. Doane did not first file an adversary proceeding. The bankruptcy court held that the discharge order was valid because ECMC received notice of the plan and the discharge order by mail, failed to object to the plan, seek reconsideration of the confirmation order or discharge order, and failed to appeal the orders. The court held that finality required that the order be given preclusive effect. 302 B.R. at 182 (A-17). The district court reversed based on the Fourth Circuit's *Banks* decision, *id.* at 183 (A-19), and the Fourth Circuit affirmed, stating that *Banks* controlled. (A-4).

Thus, Ms. Doane's case presents a square split among the Circuits. If Ms. Doane lived in one of the fifteen states within the Ninth or Tenth Circuits, she would have won her case because ECMC failed to object to the plan, seek reconsideration of the confirmation order or discharge order, and failed to appeal the orders, even though she did not file an adversary proceeding.

This case is worthy of this Court's scrutiny because

it squarely presents an issue of federal law with significant practical consequences. A fundamental precept of bankruptcy law is that it should be uniform. U.S. Const. art. II § 8 (Congress is authorized to establish "uniform Laws on the subject of Bankruptcies throughout the United States"). The number of Chapter 13 bankruptcy cases is significant and growing. During the period since 1998, when Congress made student loans nondischargeable, over one-half million families have filed Chapter 13, and the number of filings increases every year. *See* www.uscourts.gov/bnkrptcystats/MarchBK1986-2003.pdf. However, the treatment of those debtors is not uniform. Today, debtors who live in the Ninth and Tenth Circuits may obtain a discharge of their student loan debt without first filing an adversary proceeding, while debtors in the Fourth Circuit may not.

Now is the proper time for this Court to address whether student loans are dischargeable when the debtor fails to file an adversary proceeding and when the student loan creditor fails to object to the discharge order. The issue has now presented itself squarely and will continue to become important. Congress made student loans nondischargeable in 1998, and since most Chapter 13 plans last for several years, the issue has now percolated long enough for three Circuit courts to address the issue, but not too long for this Court to be unable to provide guidance to the lower courts still considering the issue. The issue will continue to be alive so long as there is a split in the Circuits.[6]

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[6] The issues is now being extensively litigated in the lower courts, but the lower courts recognize the split among the Circuits. *See, e.g., E.C.M.C. v. Repp*, 307 B.R.

II. THIS COURT SHOULD GRANT CERTIORARI TO ADDRESS WHETHER THE ADMINISTRATIVE OFFICE OF U.S. COURTS' ERRONEOUS FORM DISCHARGE ORDER IS ENTITLED TO PRECLUSIVE EFFECT.

This Court should grant certiorari because this case squarely presents another issue of federal law with significant practical consequences: the validity of the erroneous form discharge order issued by bankruptcy courts during the period 1994-2000.

11 U.S.C. § 1328 governs Chapter 13 discharges. When the Bankruptcy Code was enacted in 1978, there was no exception to discharge for student loans and all pre-petition student student loan debt was discharged when debtors received their Chapter 13 discharge. P.L. No. 94-498, 92 Stat. 2650 (Nov. 6, 1978).

In 1990, Congress passed the Student Loan Default Prevention Act of 1990, which provided that student loans which had not been due and payable for five years or which did not impose an undue hardship on the debtor would not be discharged. P.L. No. 101-508, 104 Stat. 1388 (eff. Nov. 5, 1990).

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944 (Bankr. 9th Cir. 2004)(acknowledging *Pardee*, but holding that *Banks* is also right in that due process requires an adversary proceeding); *Ruehle v. E.C.M.C.*,307 B.R. 28 (Bankr. 6th Cir. 2004)(following *Banks*); *E.C.M.C. v. Boyer*, 305 B.R. 42, 52 (Bankr. D.Kan. 2004)(*Banks* is correct, but *Anderson* conflicts and is binding in the Tenth Circuit).

The 1990 Act contained a sunset provision, whereby the exception to discharge created by the act would terminate on October 15, 1996. P.L. No. 101-581, 104 Stat. 2865 (Nov. 5, 1990). The sunset provision was repealed by Congress in 1992, thus making permanent the 1990 Act creating an exception to the Chapter 13 discharge for student loans. Higher Educ. Amendments of 1992, P.L. No. 102-32, 106 Stat. 448 (July 23, 1992).

The changes in the Chapter 13 discharge rules for student loans were not accurately reflected in the form Chapter 13 discharge orders used by many districts around the country. For example, the form Chapter 13 discharge order used by the Western District of Virginia, and issued to Ms. Doane, was not changed after the 1992 repeal of the sunset provision. The form order contained the following language from December 1992 through the summer of 2000:

> Pursuant to 11 U.S.C. § 1328(a), the debtor is discharged from all debts provided for by the plan or disallowed under 11 U.S.C. § 502, except any debt: . . . (c) for a student loan or educational benefit overpayment as specified in 11 U.S.C. § 523(a)(8) in any case in which discharge is granted prior to October 1, 1996 . . . .

The language "in any case in which discharge is granted prior to October 1, 1996" reflects the sunset provision of the 1990 statute, which provided that the exception to discharge would terminate of October 1, 1996. When the sunset provision was repealed in 1992, the form order was not changed. Thus, the order states that student loans are not discharged prior to October 1, 1996, but the

exception to discharge is expressly limited to cases in which the discharge is issued prior to October 1, 1996. Thus, under the express terms of the order, debtors who received their discharge after October 1, 1996 received a discharge of their student loans, even though they were not entitled to a discharge under the terms of the Bankruptcy Code.

This problem arose from the distribution of Chapter 13 discharge orders by the Administrative Office of the U.S. Courts. In December 1992, over two years after the enactment of the Student Loan Default Prevention Initiative Act, the Bankruptcy Judge's Division of the Administrative Office distributed to clerks' offices around the country a discharge order which stated that student loans were excluded from discharge.[7] However, since the administration of Chapter 13 Cases usually takes several years, the order was used by clerk's offices in cases which were filed prior to November 5, 1990 when the exemption to discharge was not in effect. Thus, some debtors received Chapter 13 discharge orders which incorrectly stated that their student loan debt was not discharged when the Bankruptcy Code authorized the discharge of the student loans.

To remedy this problem, the Administrative Office distributed a revised order in March 1993, labeled "For Use Only in Cases Filed Before November 5, 1990." However, the March 1993 order did not reflect the 1992 repeal of the sunset provision which made permanent the exception of

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[7] Letter to Ms. Doane's counsel from Dick Carrelli, Office of Public Affairs, Administrative Office of U.S. Courts, October 17, 2001 (the letter is not in the record of the courts below).

student loans from discharge.

In December 1994, the Administrative Office distributed a revised Chapter 13 form discharge order which removed the phrase "in any case in which a discharge is granted prior to October 1, 1996." Some clerk's offices began to use the new order in early 1995.

Unfortunately, many clerk's offices did not implement the December 1994 revision of the order. It is apparent from the cases which have been litigated that numerous other clerk's offices around the country continued to use the December 1992 order. *See*, *e.g.*, *Pearson v. U.S. Dept of Education*, 279 B.R. 612 (Bankr. M.D. Ga. 2002); *In re McClain*, unpublished order, G95-21383-REB (Bankr. N.D. Ga. Aug. 16, 2000); *In re Tyler*, unpublished order, 98-13568-FRM (Bankr. W.D. Tex. October 10, 2002); *Poland v. ECMC*, 276 B.R. 660 (D. Kan. 2001).

Thus, most of the Chapter 13 debtors in the country received erroneous discharge orders in the period from November 5, 1990 until at least 1994, and in some districts, until 2000. The errors are in three categories: (1) Chapter 13 debtors who filed their cases after November 5, 1990 and who received a discharge prior to December 1992 probably received an order which stated that their student loan debt was discharged, when the Bankruptcy Code did not authorize such discharge; (2) debtors who filed their case prior to November 5, 1990, but received a discharge prior to March 1993 probably received an order which mistakenly stated that their student loans were not discharged; and (3) debtors, in some districts around the country who received discharge orders after October 1, 1996, have an order stating that their student loan debt was

discharged when the Bankruptcy Code did not authorize such a discharge.

As debtors who received the erroneous discharge orders are contacted by student loan creditors, who demand payment of the debts, debtors have begun to litigate the issue of whether the erroneous discharge orders are valid. The decisions on whether the student loans are valid are split along the same lines as the Circuit-split in the discharge by declaration cases.

Ms. Doane's case is currently the leading case on the erroneous discharge issue. The bankruptcy court held that the erroneous discharge order was valid because ECMC failed to seek reconsideration of the discharge order, and failed to appeal the discharge order, even though it was erroneous, and finality requires that the discharge order be upheld. 302 B.R. at 182 (A-17). The district court, relying solely on *Banks*, reversed because the debtor failed to file an adversary proceeding to determine the dischargeability of the student loan, regardless of whether the discharge order was erroneous, 302 B.R at 183 (A-19), and the Fourth Circuit affirmed (App. A-4).

The Tenth Circuit B.A.P. and the lower courts in the Tenth Circuit have held that the erroneous discharge orders are valid, based on *Anderson*, which conflicts with *Banks*. *See Peterson v. Student Loan Marketing Ass'n*, 1999 Bankr. LEXIS 1317, 16 Colo. Bankr. Ct. Rep. 307 (10th Cir. B.A.P. 1999); *Poland v. ECMC*, 276 B.R. 660 (D. Kan. 2001).

Lower courts in other circuits are split on the issue. For example, the bankruptcy court for the Middle District of Georgia held that the erroneous discharge order was

valid and held ECMC in contempt for violating the discharge order by collecting the student loan. *ECMC v. Pearson*, 2000 Bankr. LEXIS 1972 (Bankr. M.D.Ga. 2000). The district court reversed, *ECMC v. Pearson*, 2002 U.S. Dist. LEXIS 815 (M.D.Ga.2002), and the bankruptcy court was forced to vacate its prior ruling. *ECMC v. Pearson*, 279 B.R. 612 (Bankr. M.D.Ga.2002). The bankruptcy court in the Western District of Wisconsin, citing *Banks* and Ms. Doane's case, found that the orders were invalid. *In re Hanson*, 306 B.R. 241 (Bankr. W.D.Wis.2003), *aff'd*, *Hanson v. ECMC*, 308 B.R. 903 (W.D. Wis. 2004).

The erroneous form discharge issue is different from the discharge by declaration problem and the two issues can be resolved differently. This Court could find that discharge by declaration is not valid because debtors who attempt to obtain a discharge by declaration are merely attempting to circumvent the requirements of the Bankruptcy Code. At the same time, this Court could find that the erroneous form discharge orders are valid because debtors who received the orders have clean hands and received the orders due to the courts' error, not the debtors' attempt to beat the system.

This Court should take Ms. Doane's case because it is unique and squarely presents the opportunity for the Court to reach this result: Ms. Doane, unlike the debtors in the cases where the Circuits are split--*Banks*, *Anderson*, and *Pardee*--did not seek a discharge by declaration. She did not file an adversary proceeding to determine the dischargeability of her student loan, she did not attempt to obtain a discharge by declaration, and she received the erroneous form discharge order only through the court's error. Thus, Ms. Doane's case would allow the Court to

address both the issue of whether an adversary proceeding is necessary to obtain a discharge of a student loan in all circumstances, which is the precise issue on which the Circuits are split, and address the validity of the erroneous form discharge order.

This Court should grant certiorari to address whether the erroneous form discharge orders are valid for three other reasons. First, this Court has a responsibility to resolve the uncertainty which has been created by the use of the order issued by the Administrative Office of the United States Courts, which is under this Court's general purview. Second, the form discharge order affects every Chapter 13 debtor who owed a student loan and received an erroneous form discharge order in the 1990s, a group of at least several hundred thousand people. Unless this Court resolves the uncertainty over the form discharge order, the amount of litigation over this issue will continue to grow as people who received discharge orders begin to hear from their student loan creditors. Third, the form discharge order, which contains the same language throughout the country, is applied disparately: in the six states of the Fourth Circuit, the order is not valid, while it has been upheld in the nine states of the Tenth Circuit. Like the discharge by declaration issue, this is an issue of federal law with significant practical consequences, and it should be resolved to maintain uniformity of the law throughout the country.

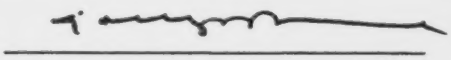
In *Beaulieu v. U.S.*, 497 U.S. 1038, 1039 (1990), Justice White wrote that this Court has a duty to maintain the law a in "satisfactory uniform condition." This case presents the Court with an opportunity to fulfill that obligation in an area which affects many Americans.

CONCLUSION

FOR THE REASONS stated herein the petitioners pray that this Court will grant this petition and review the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully Submitted,

KIMBERLY DOANE

By: 

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No. _____

In The Supreme Court of the United States

KIMBERLY DOANE,
a/k/a KIMBERLY HARIG,

Petitioner,

v.

EDUCATIONAL CREDIT MANAGEMENT CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED: August 27, 2004

No. 03-2458
BK-96-1907-RKR-7
CA-03-84-7

In re: Kimberly Doane, a/k/a Kimberly Harig, Debtor,

Educational Credit Management Corporation,
Plaintiff-Appellee

v.

Kimberly Doane, a/k/a Kimberly Harig,
Defendant-Appellant

and

Rebecca Connelly; U. S. Trustee,
Trustees.

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel consisting of Judge Widener, Judge Williams, and Judge Beezer.

FOR THE COURT

/s/ Patricia S. Connor

Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

In re: KIMBERLY DOANE, a/k/a Kimberly Harig,

Debtor.

EDUCATIONAL CREDIT MANAGEMENT CORPORATION,

Plaintiff-Appellee,

v.

KIMBERLY DOANE, a/k/a Kimberly Harig,

Defendant-Appellant,

and

REBECCA CONNELLY; U.S. TRUSTEE,

Trustees.

No. 03-2458

Appeal from the United States District Court
for the Western District of Virginia, at Roanoke.
Samuel G. Wilson, Chief District Judge.
(CA-03-84-7; BK-96-1907-RKR-7)

Submitted: May 28, 2004

Decided: June 28, 2004

Before WIDENER and WILLIAMS, Circuit Judges, and
Robert R. BEEZER, Senior Circuit Judge of the
United States Court of Appeals for the Ninth Circuit,
sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

Gary M. Bowman, Roanoke, Virginia, for Appellant. Julie K. Swedback, St. Paul, Minnesota, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Kimberly Doane appeals a district court order issued pursuant to Federal Rule of Civil Procedure 60(b) (West 1992) relieving Educational Credit Management Corporation (ECMC) from a bankruptcy court discharge order that purported to discharge Doane's student loans. Finding no error, we affirm.

I.

On June 14, 1996, Doane filed for bankruptcy protection from her creditors. At that time, Doane owed a balance on student loans owned by ECMC. Doane did not seek to have her student loans discharged during the bankruptcy, but she did list ECMC as a creditor in her bankruptcy petition, and ECMC filed a proof of claim. Doane's bankruptcy plan did not purport to affect Doane's debt to ECMC in any way.

Doane made the payments required of her under the bankruptcy plan, and on September 10, 1999, the bankruptcy court discharged Doane's debts. For reasons that are not entirely clear, the bankruptcy court issued a discharge order that purported to discharge Doane's student loans, even though such discharge was neither sought by Doane nor authorized by the bankruptcy code.[1] *See* 11 U.S.C.A.

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[1]The bankruptcy court appears to have used an outdated form discharge order. The form discharge order that the bankruptcy court used

§§ 523(a)(8), 1328(a)(2) (West 1993 & Supp. 2004) (prohibiting the discharge of student loans in bankruptcy unless the debtor proves in an adversary proceeding that excepting the debt from discharge would impose an undue hardship).

Sometime after the discharge order became final, ECMC attempted to collect the balance of Doane's student loans. Doane then filed an action in the bankruptcy court alleging that ECMC's collection activities violated the discharge order. The bankruptcy court agreed and enjoined ECMC from attempting to collect the debt, rejecting ECMC's contention that the discharge of Doane's debt to ECMC violated due process. ECMC appealed to the United States District Court for the Western District of Virginia. The district court relieved ECMC from the discharge order pursuant to Federal Rule of Civil Procedure 60(b), finding that the discharge of Doane's debt to ECMC violated due process because ECMC had not received adequate notice in the form of a properly initiated adversary proceeding. Doane now appeals.

II.

When a district court acts in its capacity as a bankruptcy appellate court, we review the bankruptcy court's decision independently. *See Kielisch v. Educ. Credit Mgmt. Corp. (In re Kielisch)*, 258 F.3d 315, 319 (4th Cir. 2001). We review the bankruptcy court's factual findings for clear error, and we review its legal conclusions de novo. *Id.*

---

was created at a time when the strictures applicable to the discharge of student loans were set to expire on October 1, 1996, pursuant to a sunset provision in the legislation creating the strictures. *See* Pub. L. No. 101-508 §§ 3007(b)(1), 3008. The form order provided that "the debtor [wa]s discharged from all debts . . . except any debt . . . for a student loan . . . in which discharge is granted prior to October 1, 1996." (J.A. at 5.) In 1992, Congress repealed the sunset provision, and the strictures became permanent. *See* Pub. L. No. 102-325 § 1558. When the sunset provision was repealed, a new form discharge order without a date restriction on the student loan exception was created, but the bankruptcy court here appears to have erroneously used the old order.

A party may be relieved from an adverse judgment if "the judgment is void." Fed. R. Civ. P. 60(b)(4). "[A] judgment is not void merely because it is erroneous. It is void only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law." *Eberhardt v. Integrated Design & Constr., Inc.*, 167 F.3d 861, 871 (4th Cir. 1999) (internal quotation marks omitted). "[W]hether [a discharge] violate[s] a creditor's due process rights [is] [a] legal question[ ] we review de novo." *Banks v. Sallie Mae Servicing Corp. (In re Banks)*, 299 F.3d 296, 300 (4th Cir. 2002).

We have held that, in the bankruptcy context, "due process entitle[s] the creditor to receive notice . . . as provided by the Bankruptcy Rules." *Banks*, 299 F.3d at 302. "The Bankruptcy Code and Rules require Debtors to bring an adversary proceeding to determine the dischargeability of their student loans." *Id.* at 300; Fed. R. Bankr. P. 7001(6) (West Supp. 2004). "Student loans are nondischargeable in bankruptcy unless the Debtor can prove excepting the debt from discharge would impose an undue hardship." *Banks*, 299 F.3d at 300. When a student loan debtor "fail[s] to initiate an adversary proceeding to establish undue hardship[,] . . . [the creditor] d[oes] not receive the requisite notice of . . . intent to discharge . . . [the] student loan debts. For lack of adequate notice, . . . discharge orders discharging the [debt] are not entitled to preclusive effect." *Id.* at 302-03 (footnote omitted).

In this case, it is undisputed that Doane did not initiate an adversary proceeding to establish undue hardship. Thus, ECMC did not receive adequate notice, and the bankruptcy court's discharge order violated ECMC's due process rights. *Id.* at 303. Because the bankruptcy court's discharge order is "inconsistent with due process of law," the order is void as to ECMC, and the district court properly relieved ECMC from the order. *Eberhardt*, 167 F.3d at 871.

III.

We agree with the district court that ECMC did not receive adequate notice of intent to discharge and that the bankruptcy court order discharging Doane's student loans is therefore void. Accordingly, we

affirm the judgment of the district court relieving ECMC from the effect of the erroneous discharge order.

AFFIRMED

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

ROANOKE DIVISION

FILED October 27, 2003

In re: KIMBERLY DOANE, a/k/a Kimberly Harig, Debtor,	)	Chapter 13 Case No. 7-96-01907-RKR
EDUCATIONAL CREDIT MANAGEMENT CORPORATION, Appellant, v. KIMBERLY DOANE, Appellee.	)	Civil Action No. 7:03CV00084

MEMORANDUM OPINION
BY: SAMUEL G. WILSON, CHIEF U.S. DISTRICT JUDGE

Educational Credit Management Corporation ("ECMC") appeals the

decision and order of the United States Bankruptcy Court for the Western District of Virginia denying ECMC relief from an order discharging the student loan debt that Kimberly Doane ("Doane") owed to ECMC. This court has jurisdiction over the appeal pursuant to 28 U.S.C. § 158(a)(1). [**2] n1 [*179] ECMC challenges the discharge on several grounds: (1) it is void under Federal Rule of Civil Procedure 60(b)(4) because the order violated ECMC's Fifth Amendment procedural due process rights; (2) the bankruptcy court lacked subject matter jurisdiction, thereby voiding the order under Federal Rule of Civil Procedure 60(b)(4); and (3) the discharge resulted from a clerical error and relief is provided under Federal Rule of Civil Procedure 60(a). Finding that the bankruptcy court's order of discharge violated ECMC's procedural due process rights, this court reverses the decision of the bankruptcy court.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n1 Doane objects to this appeal on the grounds that ECMC failed to properly note the appeal under Bankruptcy Rule 8001(a) or timely file its brief. First, ECMC noted its appeal on December 30, 2002, within ten days of the bankruptcy court's December 20, 2002, order, as provided by Bankruptcy Rule 8002. ECMC, at the request of the clerk, then filed an amended notice of appeal to correct an error in the caption on January 6, 2003, within the time period delineated by the clerk. HN1 However, "failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal." Fed. R. Bankr. P. 8001(a). Here, ECMC timely filed its original notice and any technical deficiencies under

Bankruptcy Rule 8001(a) were not jurisdictionally fatal.

Second, Doane claims ECMC failed to timely file its brief. However, HN2 "briefs are deemed filed on the day of mailing." Fed. R. Bankr. P. 8008(a). The appeal was docketed in this court on February 4, 2003, and ECMC mailed its brief on February 19, 2003, within the required fifteen days under Bankruptcy Rule 8009. Therefore, ECMC properly appealed the decision of the bankruptcy court and timely filed its brief; Doane's motion to dismiss the appeal is, therefore, denied.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - [**3]

I.

On June 14, 1996, Kimberly Doane filed a voluntary petition for relief in the United States Bankruptcy Court for the Western District of Virginia under Chapter 13 of Title 11 of the United States Bankruptcy Code. As part of the petition, Doane listed an unsecured educational' loan for $ 7.819.07 owed to the Commonwealth of Virginia, which subsequently filed a proof of claim for that loan. Doane then filed a plan of reorganization. Doane, however, did not suggest in her plan that her student loan would be discharged upon confirmation. Rather, the plan called for her to pay $ 35.00 per month for thirty-six months to her unsecured creditors, which included her student loan creditor. No creditor objected, and the bankruptcy court entered a confirmation order on November 14, 1996. Doane then began making payments pursuant to the plan.

Eight months after the bankruptcy court confirmed Doane's plan, the Commonwealth of Virginia assigned Doane's student loan to ECMC on July 14, 1997. ECMC duly filed an assignment of claim with the bankruptcy court. Thereafter, upon completion of Doane's payments under the plan, the bankruptcy court entered its "Order Discharging Debtor After Completion [**4] of Chapter 13 Plan" ("discharge order"), which was mailed to ECMC at the address provided in the assignment of claim. Mistakenly, however, the bankruptcy court utilized an outdated form for the discharge order, which purported to discharge Doane's student loan debt. n2

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n2 Although Doane's discharge order purported to discharge her student loan debt, current Bankruptcy Code provisions, and those in effect at the time of the discharge order, require a showing of undue hardship before discharge. *See* 11 U.S.C. §§ 523(a), 1328. Prior to 1990, however, student loan debt could be discharged without a showing of undue hardship. Congress amended the code in 1990 by requiring a showing of undue hardship, but included a sunset provision that limited the new requirement to discharge orders granted prior to October 1, 1996. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508 (1990). Then, in 1992, Congress again amended the Bankruptcy Code by repealing the sunset provision. 11 U.S.C. § 1328, Historical and Statutory Notes (citing Pub. L. No. 102-325). Unfortunately, Doane's discharge order erroneously contained the outdated sunset provision, thereby purporting to discharge Doane's student loan debt.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - -

[**5]

The discharge order, in pertinent parts, stated:
1. Pursuant to 11 U.S.C. § 1328(a), the debtor is discharged from all debts provided for by the plan or disallowed under 11 U.S.C. § 502, except any debt: ...
(c) for student loan or educational benefit overpayment as specified in 11 U.S.C. § 523(a)(8) in any case in which discharge is granted prior to October 1, 1996...

5. All creditors are prohibited from attempting to collect any debt that has been discharged in this case.

[*180] No creditor, including ECMC, appealed the discharge order within the ten days as provided by Bankruptcy Rule 8002(a).

After Doane's discharge, ECMC initiated collection procedures. Doane then reopened her bankruptcy case and filed an adversary proceeding on May 17, 2001, alleging that ECMC had attempted to collect a discharged educational loan. On August 8, 2001, ECMC answered, asserting numerous defenses and denying that the student loan debt was discharged. In the adversary proceeding, ECMC also filed a motion for relief from the bankruptcy court's discharge order pursuant to Federal Rules of Civil Procedure 60(a) **[**6]** and 60(b)(4), both made applicable by Bankruptcy Rule 9024. The bankruptcy court denied ECMC's motion on May 23, 2002. ECMC then requested leave to appeal, but this court denied the request as interlocutory.

After the court denied ECMC's request for leave to appeal, ECMC then filed another motion for relief in Doane's main bankruptcy case, rather than in the adversary proceeding, reasserting its Federal Rules of Civil Procedure 60(a) and 60(b)(4) claims and asserting that the bankruptcy court lacked subject matter jurisdiction to enter an order not in compliance with the Bankruptcy Code. By order dated December 20, 2002, the bankruptcy court denied ECMC's motion and incorporated its May 23, 2002 decision, at which point the discharge order was ripe for appeal. ECMC raises the following issues in his appeal: 1) the bankruptcy court's discharge order should be vacated as void under Federal Rule of Civil Procedure 60(b)(4) because it was entered in a manner inconsistent with due process of law; 2) the bankruptcy court's discharge [**7] order should be vacated as void under Federal Rule of Civil Procedure 60(b)(4) because the court lacked subject matter jurisdiction; and 3) the bankruptcy court erred by not vacating the discharge order under Federal Rule of Civil Procedure 60(a) because the order was entered though a clerical mistake.

II.

As noted by all the parties, Doane's discharge order purported to discharge student loan debt in a manner inconsistent with the current provisions of the Bankruptcy Code. Since the discharge order violated provisions of the Bankruptcy Code, the court must now determine whether to accord the discharge order *res judicata,* or as ECMC urges, vacate the judgment as void. This court holds the bankruptcy court's judgment void because the bankruptcy court entered

it in a manner inconsistent with the requirements of due process of law. The judgement of the bankruptcy court is, therefore, reversed.

HN3 Under Federal Rule of Civil Procedure 60(b)(4), a court may relieve a party from a final order or judgment if the judgment is void. In the interest of finality, however, [**8] the concept of a void judgment is narrowly construed and "a judgment is not void merely because it is erroneous." Eberhardt v. Integrated Design & Constr., Inc., 167 F.3d 861, 871 (4th Cir. 1999); Baumlin & Ernst, Ltd. v. Gemini, Ltd., 637 F.2d 238, 242 (4th Cir. 1980). Despite the narrow construction, a void judgment may be subsequently challenged; "rule 60(b)(4) is not subject to any time limitation." Molinary v. Powell Mountain Coal Co., 76 F. Supp.2d 695, 699 (W.D. Va. 1999). Therefore, this court may review the order of the bankruptcy court and determine the merits of appellant's Federal Rule of Civil Procedure 60(b)(4) claim.

As interpreted by the Fourth Circuit Court of Appeals, HN4 a judgment is void under Federal Rule of Civil Procedure 60(b)(4) if "the rendering court lacked personal [*181] jurisdiction, subject matter jurisdiction, or acted in a manner inconsistent with due process of law." Eberhardt, 167 F.3d at 871 (quoting Schwartz v. United States, 976 F.2d 213, 217 (4th Cir. 1992)). In this case, ECMC argues that [**9] it did not receive the notice properly due under the Bankruptcy Rules and Code and that the bankruptcy court deprived ECMC of an opportunity to object or to have a hearing before the court discharged Doane's student loan.

A.

In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 94 L. Ed. 865, 70 S. Ct. 652 (1950), the Supreme Court stated that HN5 due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." More specifically, due process requires notice of a hearing as provided by the Bankruptcy Rules and Code. Banks v. Sallie Mae, 299 F.3d 296, 302 (4th Cir. 2002) (citing In re Linkous, 990 F.2d 160, 163 (4th Cir. 1993)). HN6 In the context of student loan debt, discharge requires a showing of undue hardship. *See* 11 U.S.C. §§ 523(a)(8), 1328. To that end, the debtor must satisfy the heightened notice requirements of an adversary proceeding by filing a complaint and by serving process upon the appropriate creditor-defendant. Banks, 299 F.3d at 300-01. [**10] *See also* Fed. R. Bankr. P. 7001(6); 4007(a); 7003.

HN7 There are many aspects to and actions that may be taken in bankruptcy cases which affect the general administration of the case and all creditors generally, but none specifically. Generally, such matters require "notice," but not service of process. When the rights of specific parties become an issue, however, service of the initiating motion or objection on the affected party is required. Mailing the proposed plans, the hearing notice, and the confirmation order satisfies the "notice" requirement under [Bankruptcy] Rule 2002, but not the service and summons requirement of [Bankruptcy] Rule 7004.

Banks, 299 F.3d at 301 (internal citations omitted). Moreover, HN8 in an adversary proceeding involving a corporate defendant, the plaintiff must serve "an officer, a managing or general agent, or ... any agent authorized by appointment or by law to receive service of process." Id. at 301 (citing Fed. R. Bankr. P. 7004(b)(3)). *See also* Cen-Pen Corp. v. Hanson, 58 F.3d 89, 93 (4th Cir. 1995) (indicating [**11] that where a Bankruptcy Rule "expressly requires initiation of an adversary proceeding" the creditor has the right to receive service of process in accordance with Bankruptcy Rule 7004(b)(3)). Therefore, absent specific notice of a debtor's intent to discharge a student loan debt, including the requisite service of process in an adversary proceeding, a court may not discharge student loan debt without violating due process.

B.

Despite Fourth Circuit precedent requiring a properly initiated adversary proceeding as a prerequisite for the discharge of student loan debt, Doane argues, and the bankruptcy court agreed, that ECMC received adequate due process notice. First, Doane asserts, ECMC received notice satisfying due process when it received a copy of the discharge order pursuant to Bankruptcy Rule 4004(g). Bankruptcy Rule 4004(g) simply states that HN9 "the clerk shall promptly mail a copy of the final order of discharge to [all creditors in the manner provided in Bankruptcy Rule 2002]." Fed. R. Bankr. P. 4004(g). However, as stated in Banks, HN10 notice provided under Bankruptcy Rule 2002 is inadequate [*182] when the debtor intends to discharge a [**12] nondischargeable student loan debt. In such

circumstances, the debtor must comply with the notice provisions of Bankruptcy Rule 7004. Here, Doane never served process on the proper agent under Bankruptcy Rule 7004. Rather, the clerk of the bankruptcy court merely mailed the discharge order to ECMC at the address ECMC provided in the assignment of claim, pursuant to Bankruptcy Rule 2002. n3 Since Doane failed to specifically notify ECMC of her intent to discharge her student loan debt, as required by the Bankruptcy Rules and Code, the subsequent discharge order denied due process to ECMC.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n3 HN11 Under Bankruptcy Rule 2002, the clerk of the bankruptcy court mails each creditor notice to an address the creditor specifically requests or to the address shown on the list of creditors.

- - - - - - - - - - - - - End Footnotes - - - - - - - - - - - - - -

Second, Doane argues that ECMC in effect waived its due process rights by receiving a copy of the discharge order and, thereafter, failing to take any action to attack that order. In Banks, however, the Fourth Circuit found a violation [**13] of due process where the creditor received notice of the purported discharge of student loan interest before the confirmation hearing, providing more opportunity to object than in the present case. Banks, 299 F.3d at 299. As in Banks, the debtor in the present case never satisfied the notice requirements of Bankruptcy Rule 7004. Furthermore, in this case, ECMC failed to receive any notice of the purported discharge until after the discharge order, when its rights were effectively decided. Although ECMC could have appealed the discharge order within ten days of entry, the

lack of appropriate notice under the Bankruptcy Rules and Code provided no meaningful notice or opportunity to be heard prior to entry of the order. In fact, ECMC could have challenged entry of the discharge order only if it was able to anticipate the error before the bankruptcy court even entered it. Such a deficiency falls short of the notice standard applied in Banks, and violates due process.

C.

Finally, both the bankruptcy court and Doane rely extensively on Spartan Mills v. Bank of America Illinois, 112 F.3d 1251 (4th Cir. 1997), as preventing a collateral attack **[**14]** on a final order of the bankruptcy court. That reliance is misplaced. In Spartan Mills, the Fourth Circuit considered a case involving disputed first lien priority status between two creditors. In that case, the Bankruptcy Court for the Southern District of Florida entered a provisional order establishing first lien status for Bank of America and requiring conflicting creditors to timely object. Id. at 1253. Although Spartan Mills, which acted as a representative of the unsecured creditors committee, received notice of the provisional order, no creditor, including Spartan Mills, objected. The bankruptcy court then entered an order directing sale of the debtor's assets. Id. at 1253. Like the provisional order, Spartan Mills received actual notice of the order directing sale, but failed to object. Id. at 1253. n4 One month after the order directing sale, **[*183]** the court approved the sale of assets and granted Bank of America first priority in the proceeds. Id. at 1254. Then, a year-and-a-half after the sale, Spartan Mills filed an action in the District Court of South Carolina objecting to the bankruptcy court's

ruling. On [**15] appeal, the Fourth Circuit rejected Spartan Mills' collateral attack on the bankruptcy court's order and held that Spartan Mills did not lack due process knowledge. Id. at 1255, 1258 (noting that "this is not the case where [the creditor] was caught by surprise because of a lack of due process notice").

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n4 After the court's order directing sale, Spartan Mills filed an adversary proceeding in the bankruptcy court, asserting its priority in the lien and challenging the bankruptcy court's rulings. Id. at 1254. Spartan Mills, however, failed to take any action to prosecute the adversary proceeding and voluntarily dismissed it. Id. at 1255. Although under Bankruptcy Rules, adversary proceedings should be filed by the debtor and notice should be provided as directed by the Bankruptcy Rules and Code, Spartan Mills' action "belied any claimed lack of knowledge." Id. at 1257.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Unlike Spartan Mills, ECMC did not have the notice required by due process. [**16] Spartan Mills, a party to the bankruptcy proceeding in Florida, received actual notice of the lien priority orders issued by the bankruptcy court before the orders became final. As noted by the court, "it ... cannot be disputed that Spartan Mills was a party to the bankruptcy proceedings in Florida. It was a creditor; it received notice of all proceedings; it served as representative of the creditors' committee; and it filed its own adversary proceeding ..." Id. at 1256. In this case, however, ECMC never participated in any of the bankruptcy proceedings. It was never a party to the action; it never served on a creditor's committee; and it never received specific notice, such as

service of process, of any of the proceedings. Moreover, it had no opportunity to object to the discharge order because the order was already final at the time ECMC received it. Therefore, unlike Spartan Mills, ECMC failed to receive the proper protections provided by due process.

III.

In sum, following the decision of the Fourth Circuit in Banks, this court finds the Bankruptcy Rules and Code required Doane to provide proper notice of an adversary proceeding before the bankruptcy court [**17] discharged her student loan debt. By failing to give specific notice, the discharge violated ECMC's due process rights and the order of bankruptcy court is void. Having decided this case on due process grounds, this court finds it unnecessary to examine the other claims of ECMC.

Accordingly, this court declines to award the bankruptcy court's May 23, 2002, order and December 20, 2002, order preclusive effect. The decision of the bankruptcy court is reversed. The court finds that ECMC's claim against Doane survived the bankruptcy court's Order of Discharge.

ENTER this October 27, 2003.

ORDER